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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 1003

RICHARD E. LOCKE,
Petitioner,

vs.

RIVER LINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

The only question presented by this record is whether it was error in the Court of Appeals to have lacked a definite and firm conviction that the District Court was wrong in finding that negligence and unseaworthiness were not proved and to refuse, accordingly, to set aside the findings as clearly erroneous.[1]

[1]Findings are to be set aside as clearly erroneous only when the Court of Appeals has the "definite and firm conviction that a mistake has been committed." *United States v. Oregon State Medical Society*, 343 U.S. 326, 339 (1952).

STATEMENT

Under a contract of towage respondent's tug YUBA had towed a barge some distance down the Sacramento River and had occasion to leave the barge and return upstream to bring down another (Findings 5 and 6).[2] In the absence of artificial mooring places and in accordance with the custom of the river (Finding 9) the master maneuvered the barge alongside the bank to be tied to a certain cottonwood tree (Finding 5). Petitioner, a deckhand on the tug, boarded the barge and proceeded to the area on the barge from which he would pass a line about the cottonwood tree (Finding 7).

As the barge reached the bank, after a customary and uneventful maneuver and without unusual force (Findings 10 and 11), a branch or portion of trunk, unknown to anyone concerned to be dead, fell from the top of a willow tree near the cottonwood tree to which the barge was to be tied and struck and injured Petitioner's arm (Finding 7).

Certain misstatements of these underlying facts run through the Petition and call for correction: first, it is not true that the cottonwood tree to which the barge was to be tied broke, but it was instead a nearby willow tree (Finding 7); second, it was not true that the master had knowledge of any defect in the tree or any likelihood that it would break (see Finding 7) and there was no evidence whatever of such knowledge to contradict the finding of reasonable care (Finding 13).

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[2]The Transcript of Record consists of three volumes. Volume II, the Clerk's Transcript of Record from the District Court, was not paginated consecutively. It is impossible, therefore, to provide meaningful page references to Volume II and accordingly the references indicate the documents in Volume II by name only.

Petitioner sued the owner of the tug claiming negligence in the maneuever and unseaworthiness of both the tug and the barge. The matter was fully heard and, upon all the evidence, the District Court found that Respondent had not been negligent and that both the tug and the barge were reasonably fit for the service in which they were engaged and therefore seaworthy (Findings of Fact and Conclusions of Law).

Petitioner appealed to the Court of Appeals attacking the District Court's findings of reasonable care and reasonable fitness and the Court of Appeals in its opinion concluded that the findings in question were not shown to be clearly erroneous (Opinion, R. Vol. I, p. 4).

ARGUMENT

1. NO IMPORTANT QUESTION OF FEDERAL LAW IS PRESENTED

This case turns simply upon questions of fact peculiar to itself. The finding of seaworthiness is a finding of fact. *Luckenbach v. McCahan Sugar Refining Co.*, 248 U.S. 139, 145 (1918). So also is a finding of reasonable care or lack of negligence. *Pacific Tow Boat Co. v. States Marine Corp.*, 276 F.2d 745, 752, 1960 A.M.C. 696, 705 (9th Cir.). No novel or unfamiliar doctrine was announced or resorted to by either of the courts below in respectively making and affirming these findings.

In an effort to state the questions in such a way as to involve matters of law, Petitioner has employed facts contrary to the record, as we have already pointed out. The Court will readily recognize that when these facts

are correctly stated the apparent legal content of Petitioner's questions disappears.

While this case is of obvious importance to the individual parties involved, the particular facts upon which it turns are most unusual and so the ruling is of little importance to others than the parties here.[3] As the case involves neither a question of law nor an important question of general interest, it clearly does not involve an important question of Federal law which requires to be settled by this Court.

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2. NO CONFLICT WITH THIS COURT OR ANOTHER COURT OF APPEALS IS PRESENTED

Petitioner suggests the existence of a conflict with five other decisions of the Courts of Appeals and one decision of this Court but a review of the holdings in those cases discloses no conflict at any point.

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[3]We are not unmindful that Petitioner may be trying to present through this case a much broader question of the application of the warranty of seaworthiness, upon which this record is scarcely appropriate and as to which none of the parties having a substantial concern is represented here. To treat this case as a matter of law and hold the tug owner liable for unseaworthiness would require the disposition of three questions by this Court; first, whether the warranty should be extended to piers and other artificial moorings; second, whether it should then also be extended to natural features used in the absence of such artificial facilities; and, third, to what extent the warranty should extend outward into the environment of either artificial or natural moorings. This case surely does not present a record upon which the Court should undertake to determine whether the warranty of seaworthiness should be deemed extended by the owners of seagoing vessels to all the piers, quays, wharves, docks, jetties, floats and lighters alongside which their vessels may find themselves moored, not merely in the United States, but in Santo Domingo, Singapore or Saigon.

Huff v. Matson Navigation Co., 338 F.2d 205, 1964 A.M.C. 2219 (9th Cir.) is a case not from another Circuit but from the same Circuit as the present case. There the District Court held, as a matter of law, that, in determining the seaworthiness of the vessel as respects an injured longshoreman, it would not consider the condition of shore-based discharging equipment extending down into the hold of the vessel where the accident occurred and the Court of Appeals held simply that it was error to exclude from consideration the modern shore-based discharging equipment which had replaced more primitive shipboard methods but did not itself find the vessel unseaworthy and remanded the case to the District Court for that issue of fact to be determined, as usual, in the light of all the circumstances of the case.

Olson Tow Boat Co. v. Dutra, 300 F.2d 883, 1962 A.M.C. 1286 (9th Cir.) is again from the same Circuit as the present case. There, as here, the Court of Appeals affirmed the findings of the trier of fact. In that case unseaworthiness and negligence had been found, with regard to a metal barb on the wire mooring line by which the tug was tied to the pier, where there was no showing that the line belonged to the tug rather than to the pier. Not only was such a line obviously a part of the normal equipment of the vessel but it had clearly been incorporated into the vessel's appurtenances under the standard of *Alaska Steamship Co. v. Petterson*, 347 U.S. 396, 1954 A.M.C. 860. Nothing in that case appears to compel the District Court to find the vessels not reasonably fit for their service in the circumstances of the present case.

In *Beard v. Ellerman Lines, Ltd.*, 289 F.2d 201, 1961 A.M.C. 1147 (3rd Cir.), the Court of Appeals simply held that there was evidence sufficient to permit the jury to find negligence of the shipowner and did not reach the question of seaworthiness. Similarly, in *Thompson v. Calmar Steamship Corp.*, 331 F.2d 657, 1964 A.M.C. 2249 (3rd Cir.), the Court held that there was evidence of both negligence and unseaworthiness sufficient to permit the jury to bring in a verdict for the plaintiff, as it did.

In *Rich v. Ellerman & Bucknall Steamship Co.*, 278 F. 2d 704, 1960 A.M.C. 1580 (2d Cir.), the plaintiff's claim was that he had been injured as a result of unseaworthiness in respect of the condition of a working platform consisting of certain cargo stowed prior to his injury and the Court of Appeals held that it was wrong, in the face of such a claim, for the District Court to have instructed the jury that the vessel owner would not be liable for an injury resulting solely from the manner in which the stevedore did the work, since such an instruction would bar the plaintiff's recovery if the condition of unseaworthiness of which he complained happened to have been created by the stevedore.

Finally, in *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 1963 A.M.C. 1649, in contradistinction to the present case, the trier of fact found negligence and unseaworthiness with respect to stowage and the Court of Appeals overturned the findings when, in the judgment of this Court, there was sufficient evidence to support them.

None of the cases discussed presents any analogy to the present case. The most analogous case to the present one

which appears to have been discovered by either party is *Morales, et al. v. The City of Galveston,* 370 U.S. 165, 1962 A.M.C. 1450. There the libelants had been injured when grain containing an excessive amount of insecticide gas was released by the elevator into the cargo hold where they were working, making the hold untenable because of the presence of noxious fumes. Despite the fact that the fumes made the hold dangerous, the District Court's finding that the vessel was reasonably fit and therefore seaworthy was affirmed, as here, by the Court of Appeals. This Court noted that the injuries were not caused by the ship, her appurtenances, or her crew but by the unexpected introduction of a "noxious agent from without" and, as the trier of fact had found the vessel reasonably fit, under proper criteria, this Court found no basis to say that the determination was wrong, notwithstanding the occurence of an injurious condition. The *Morales* case concerned the intrusion into the vessel of a substance which was mixed with cargo then being loaded aboard and therefore somewhat more closely associated with the vessel and her appurtenances than the willow tree on the bank in the present case. It therefore clearly supports the District Judge in his determination that the vessel was not rendered unseaworthy by the intrusion of the willow branch which proved to be the noxious agent here.

Thus it appears that in this case the Court of Appeals has not rendered a decision in conflict with the decision of another Court of Appeals on the same matter or in conflict with applicable decisions of this Court but that, on the contrary, the decision of the Court of Appeals here is in accord with the decision of this Court in the only analogous prior case to be found.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Dated, San Francisco, California,
March 7, 1966.

GRAYDON S. STARING,
Attorney for Respondent.

LILLICK, GEARY, WHEAT, ADAMS & CHARLES,
Of Counsel.